

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of) PR Docket No. 93-35
)
 Amendment of the Commission's Rules To) RM-7986
 Provide Channel Exclusivity To Qualified)
 Private Paging Systems At 929-930 MHz)
 To: The Commission

RECEIVED
 JUN 23 1994
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

MOTION TO STRIKE

American Mobilphone, Inc. ("AMI"), by its counsel, moves to strike the pleading filed by Communication Innovations Corporation ("CIC") in the above-referenced proceeding on May 18, 1994. CIC styles the pleading "Reply Comments", but the pleading is really a fatally untimely filed petition for reconsideration. Section 405 of the Communications Act of 1934, as amended, requires the pleading to be stricken.

A. **Background**

1. The Commission released a Report and Order in the above-referenced proceeding on November 17, 1993 (the "R&O").¹ The text of the R&O was published in the Federal Register on November 26, 1993. AMI and six other parties filed timely Petitions for Reconsideration of the R&O on or before December 27, 1993 (the "Petitions").

2. On May 18, 1994, CIC filed a pleading it styled as "Reply Comments". Though CIC's pleading references the Petition for Reconsideration filed by AMI, it is neither a reply nor an

¹ See Report and Order in PR Docket 93-35, 8 FCC Rcd 8318 (1993).

opposition to AMI's petition. CIC's pleading raises new arguments relating to the Commission's R&O, and as such is actually a petition for reconsideration. The only relief sought by CIC is a change in the R&O not requested by any of the petitioners, for the purpose of helping CIC's private needs. As a petition for reconsideration, CIC's pleading is, by statute, untimely and must be stricken.

B. CIC's Pleading Is a Fatally
Untimely Petition for Reconsideration

3. Though styled "Reply Comments", CIC's post-R&O pleading is really in the nature of a petition for reconsideration. CIC's pleading asks the Commission to rethink some of the conclusions it reached in the R&O. See CIC Pleading pp. 7-10. No matter how a party wishes to style a pleading, if the whole purpose of the pleading is to ask the Commission to reconsider aspects of a report and order, the pleading is a petition for reconsideration, and is subject to Section 405 of the Communications Act of 1934, as amended (the "Act").² See Association of College and University Telecommunications Administrators, 72 RR 2d 356 (¶ 5) (1993).

4. Section 405(a) of the Act states, in pertinent part:

A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of.

47 U.S.C. § 405(a). This is a strict statutory requirement that

² 47 U.S.C. § 405.

the Commission cannot waive or extend without an extraordinary showing of cause by the petitioner.³

5. The R&O was published in the Federal Register on November 26, 1993. Because the statutory period for seeking reconsideration of that R&O expired on December 27, 1993, CIC's pleading, filed almost five months after that date and without any showing of the cause for the delay is grossly untimely and must be stricken from the record in this proceeding.

6. Late-filed requests for reconsideration of Commission actions can be entertained only "where extraordinary circumstances indicate that justice would thus be served." Gardner v. F.C.C., 36 RR 2d 725 (U.S.App.D.C. 1976). See also Virgin Islands Telephone Corp., 989 F.2d 1231, 1237 (D.C. Cir. 1993) (Commission justified in not accepting petition for reconsideration filed one day after Section 405 deadline). Underlying these stringent regulations is the desire to require interested persons to join proceedings at the earliest opportunity, instead of after FCC "final" orders. See United Church of Christ v. FCC, 911 F.2d 803, 808 (D.C. Cir. 1990).

7. Gardner is the only case of which AMI is aware in which the Commission has ever been held to have authority to waive the statutory 30-day deadline. In Gardner, an adjudicatory case, the Commission had admittedly failed to serve its decision upon one of the parties to the case, in blatant violation of the Administrative

³ See Portland Cellular Partnership, 8 FCC Rcd 4146, 4146 n.4 (1993); MDS Signal Group, 8 FCC Rcd 1586 (1993). See also Reuters Limited v. FCC, 781 F.2d 946, 952 (D.C. Cir. 1986) (holding that the Commission exceeded its authority when it considered an untimely petition for reconsideration).

Procedure Act. The party learned of the decision by chance, and filed for reconsideration within two weeks (34 days after release of the decision). The Court of Appeals ruled that the FCC was empowered to waive Section 405 to remedy its own inexcusable violation of the APA. Subsequent cases, e.g. Reuters, supra, Virgin Islands, supra, have limited the scope of Gardner to its extraordinary facts. Gardner does not justify CIC's late-filed pleading.

C. Conclusion

8. CIC has demonstrated no circumstances to warrant departure from the rigid statutory deadline established for the filing of petitions for reconsideration. CIC ignored the December 27, 1993 deadline for the filing of reconsideration requests that would, based on the terms of the Act, be entertained by the FCC. The new arguments CIC raises here cannot be considered without adversely affecting the interests of all of the parties that have an interest in prompt resolution of this proceeding and who have abided by the Act and applicable FCC rules. See e.g. Motion for Expedited Consideration of Paging Network, Inc. filed June 3, 1994. However CIC's pleading is classified, it is grossly untimely and must be stricken. Any interest the Commission might have in addressing the concerns of CIC (which relate only to CIC's

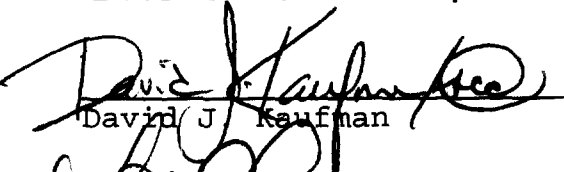
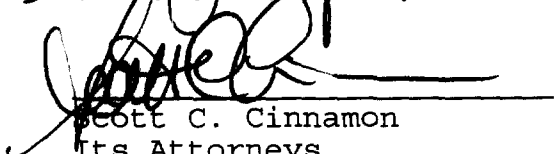
particular plight) is outweighed by the public interest in bringing this proceeding to a close.

Respectfully submitted,

AMERICAN MOBILPHONE, INC.

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June 23, 1994


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CERTIFICATE OF SERVICE

I, Phyllis D. Lee, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**MOTION TO STRIKE**" to be sent via first class U.S. mail this 23rd day of June, 1994 to each of the following:

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